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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLE

No. 72-1261

DETROIT TYPOGRAPHICAL UNION NO. 18, INTERNATIONAL TYPOGRAPHICAL UNION,
Petitioner.

vs.

DETROIT NEWSPAPER PUBLISHERS ASSOCIATION, THE DETROIT NEWS, AND THE DETROIT FREE PRESS,
Respondents.

BRIEF IN OPPOSITION TO GRANT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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BRIEF IN OPPOSITION TO GRANT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Respondents, Detroit Newspaper Publishers Association, The Detroit News, and The Detroit Free Press, hereby files its opposition to granting the writ of certiorari in the above-captioned matter.

OPINIONS BELOW.

The opinion of the United States Court of Appeals for the Sixth Circuit (Pet. App. 1A-13A) is not yet officially reported. The United States District Court for the Eastern District of Michigan entered an oral and unreported opinion (Pet. App. 16A-19A) on November 14, 1972.

JURISDICTION.

The judgment of the Court of Appeals was entered on December 20, 1972. The petition for a writ of certiorari was filed on March 15, 1973. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

1. Whether in an action brought under § 301(a) of the Labor-Management Relations Act, a federal district court has the prerogative or the power to construe and pass upon the applicability of a provision of a collective bargaining agreement obligating the parties to maintain the status quo as to wages, hours and working conditions pending arbitration of a contract dispute as to such matters, or whether the construction and applicability of such a status quo provision is properly the province of the arbitrator.

2. Whether, if a federal district court has any prerogative or power to issue injunctive relief in order to maintain the status quo pending arbitration or to enforce a status quo clause, the court must follow the procedural requirements of Section 7 of the Norris-LaGuardia Act (29 U. S. C. § 107) and make specific factual findings of irreparable injury as a prerequisite to ordering such relief, or whether a proved violation of a "status quo" clause alone constitutes justification for enforcement.

STATUTORY PROVISIONS INVOLVED.

The relevant provisions of the Norris-LaGuardia Act (29 U. S. C. § 101 *et seq.*) and the Labor-Management Relations Act (29 U. S. C. § 141 *et seq.*)are set forth in the petition at pp. 3-4.

COUNTER-STATEMENT OF THE CASE.

On September 26, 1972, the Detroit News ("News") informed the Union that it was going to utilize certain electronic editing equipment. The Union told the News that the utilization of this equipment by individuals outside of the composing room for purposes of preparing "computer input and/or tapes for publication" would be considered as a violation of the Collective Bargaining Agreement between the parties.

In an effort to resolve the dispute between the parties the News filed a grievance regarding its right to utilize electronic editing equipment. Failing to reach agreement in the lower steps of the grievance procedure, the matter was submitted to arbitration. An arbitrator selected by the parties heard testimony and arguments on January 18 and 19, 1973.

The News began to utilize the equipment in question on live copy on October 30, 1972. The Union immediately protested on the ground that the News was in violation of the Collective Bargaining Agreement, including the "status quo" provision of the Agreement. On that same day the News informed the Union that in its opinion the "status quo" clause was not applicable to the instant dispute. The News, however, indicated its willingness to resolve any question as to the applicability of the "status quo" clause through the grievance arbitration procedure set forth in the Collective Bargaining Agreement.

Rather than pursue the matter through the grievance and arbitration procedure, the Union filed a complaint for a preliminary and permanent injunction in the District Court. After the holding of an evidentiary hearing, the District Court on November 14, 1972 entered an order enjoining the News from utilizing its electronic editing equipment unless the equipment was operated by members of the Union or was used for test purposes. The sole basis of this order was the District Court's

finding that the News violated the "status quo" clause of the contract (Pet. App. 19A). The Sixth Circuit reversed.

The Sixth Circuit first held that it "was not the prerogative of the District Court to construe the status quo clause of the contract" (Pet. App. 5A). The Court went on to hold that the District Court was bound to follow the procedural mandate of Section 7 of the Norris-LaGuardia Act and that it had failed to "weigh the equities between the parties" or make findings of fact to show irreparable harm (Pet. App. 5A-8A). The Court indicated, however, that the presence of a "status quo" provision did not preclude the granting of injunctive relief if the District Court made specific factual findings of irreparable injury after a weighing of the equities between the parties.

ARGUMENT AGAINST GRANTING THE WRIT.

1. The Sixth Circuit Properly Held That Construction of the Status Quo Clause Was a Matter for the Arbitrator Rather Than the Court.

Whether or not the status quo clause was violated is a question for an arbitrator and not a court. *United Steelworkers of America* v. *Warrior and Gulf Navigation Co.*, 363 U. S. 574 (1960); *International Union of Operating Engineers, Local 150* v. *Flair Builders, Inc.*, 406 U. S. 487 (1972). Nothing in the contract exempts "status quo" from arbitration and the record shows that the status quo clause has previously been the subject of arbitration between these very parties.[1] Thus, the Sixth Circuit correctly followed the principles set forth by this

1. The issue of whether the "status quo" clause is applicable to a particular dispute is one frequently presented in newspaper arbitrations. See, *e.g.*, *Hillbro Newspaper Printing Co.*, 28 LA 769 (Hildebrand, 1957); *San Jose Mercury*, ANPA Labor Bulletin No. 5860 (Jan. 26, 1962).

Court in the Steelworkers trilogy[2] in finding the status quo clause arbitrable.

2. The Sixth Circuit's Decision Is in Conformity with Decisions of Other Courts on the Subject.

In *New York Mailers Union No. 6* v. *New York News Inc.*, 81 LRRM 2590 (N. Y. Sup. Ct. 1972), injunctive relief was denied on the ground that it is for an arbitrator and not a court to decide whether a status quo clause was applicable to the particular dispute.[3] Petitioners attempt to establish a *potential* conflict between the Sixth Circuit's decision here and the Third Circuit in *Pittsburgh Newspaper Printing Pressmen's Union No. 9* v. *Pittsburgh Press Co.*, ... F. 2d ...., 81 LRRM 2438 (3rd Cir. 1972) is hardly a reason to invoke this Court's jurisdiction. The District Court in *Printing Pressmen* v. *Pittsburgh Press Co.*, 343 F. Supp. 55 (W. D. Pa. 1972) held that the status quo clause was arbitrable and there is no indication in the summary order of Judge Aldisert to the contrary. Indeed, the Third Circuit in reinstituting the injunction granted by the District Court merely enjoined the Pittsburgh Press Company from laying off certain situation holders in the composing room, relief which the Sixth Circuit specifically indicated could be granted under the terms of its decision (Pet. App. 9A).

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2. *United Steelworkers of America* v. *American Manufacturing Co.*, 363 U. S. 564 (1960); *United Steelworkers of America* v. *Warrior and Gulf Navigation Co.*, 363 U. S. 574 (1960); *United Steelworkers of America* v. *Enterprise Wheel and Car Corp.*, 363 U. S. 593 (1960).

3. That determinations as to the applicability of status quo clauses are for arbitrators and not courts is evident from the decision of Arbitrator Peter Seitz in *New York News*, ANPA Labor Bulletin No. 6265 (Dec. 15, 1972). In *New York News*, a state court had granted an injunction on the ground that there was a violation of the status quo clause. Arbitrator Seitz, however, held that the publisher did not violate that clause and in his judgment the issuance of the restraining order was erroneous and represented a misreading of the parties' agreement.

3. The Sixth Circuit Correctly Distinguished Between Equitable Relief Designed to Prevent Irreparable Injury and Judicial Enforcement of the Status Quo Clause of a Collective Bargaining Agreement.

Petitioner confuses equitable relief designed to maintain the status quo pending arbitration and injunctive relief designed to enforce a status quo clause contained in a collective bargaining agreement. As Petitioner itself states,

> ". . . maintenance of the status quo is an historic equitable device used to preserve conditions giving rise to a dispute, pending litigation or arbitration of the dispute itself." (Pet. at 13.)

By contrast, the District Court did not merely utilize its traditional equitable powers, but rather engaged in a wholesale consideration of the merits of a contractual dispute involving the "status quo" provision of the collective bargaining agreement (Pet. App. at 19A).

Contrary to Petitioner's assertion the Sixth Circuit's decision does not stand for the proposition that injunctive relief designed to maintain the status quo can never be granted. The Sixth Circuit properly held that such injunctive relief can be granted provided the District Court balances the equities and makes findings of fact showing irreparable harm. See *Auto Workers* v. *Budd*, 345 F. Supp. 42 (E. D. Pa. 1972); *Association of Professional Engineering Personnel* v. *Radio Corporation of America*, 183 F. Supp. 834 (D. N. J. 1960). The Sixth Circuit merely held that injunctive relief designed to enforce a *contractual provision* could not be granted insofar as the decision whether the contract clause had been violated was for the arbitrator rather than for the court.

Moreover, Petitioner's assertion that the Sixth Circuit's decision renders all status quo clauses "totally impotent" and "a nullity" (Pet. App. at 10) is mistaken. If the provision is violated an arbitrator can remedy such violation by monetary

relief. See, *e.g., Bieski* v. *Eastern Automobile Forwarding Co.*, 354 F. 2d 414, 417 (3rd Cir. 1965). By definition, if it clearly appears that the arbitrator's award cannot fully remedy such violation, "irreparable injury" might be occurring and a court could then grant injunctive relief pending arbitration as it could in dealing with any other clause in a labor contract. The clause is thus not "a nullity," but rather is fully enforceable.

In this light, the Sixth Circuit's holding that the presence of a status quo clause did not preclude the grant of injunctive relief in appropriate situations is neither confusing nor surprising. It has long been recognized that injunctive relief can be issued under traditional equitable principles in order to preserve the status quo pending arbitration. See, *e.g., United Steelworkers* v. *Blaw-Knox Foundry and Mills Machinery, Inc.*, 319 F. Supp. 636 (W. D. Pa. 1970). Ir granting such relief, however, the courts were *not* making a finding as to the merits of a contractual dispute. The courts in these cases were simply maintaining the status quo on an equitable basis by protecting employee rights pending arbitration of the underlying dispute.

Here the Sixth Circuit properly recognized the distinction between preserving the status quo on an equitable basis and enforcement of a status quo clause. As recognized by the Sixth Circuit it is permissible to preserve the status quo so as to protect employee rights which could not otherwise be adequately preserved pending arbitration, but it is not permissible to find a violation of the status quo clause since this would require the court to pass on the merits of a contractual dispute.

4. Enforcement of a Status Quo Clause Cannot Be Equated to Enforcement of an Agreement to Arbitrate.

Contrary to Petitioner's assertion, the enforcement of a status quo clause cannot be equated to the enforcement of the duty to arbitrate. If injunctive relief were withheld when a party refused to arbitrate, the agreement to arbitrate would be worth-

less. In such a situation, by definition, the arbitrator could not remedy the violation of the contract, and injunctive relief offers the only avenue whereby the injured party could be made whole.

Here, however, injunctive relief is not necessary because the arbitrator may remedy the violation of the contract. Moreover, to allow the court to pass on the merits of this dispute would be contrary to this Court's consistent policy favoring arbitration as the preferred method of settling industrial disputes. In this situation, judicial enforcement of the status quo clause would nullify the right of the News to have the meaning of this clause determined by an arbitrator. To accept Petitioner's argument would thus undermine rather than strengthen the arbitral process.[4]

5. The Sixth Circuit Correctly Held That the District Court Was Not Free to Ignore the Procedural Mandates of Section 7 of the Norris-LaGuardia Act.

The Sixth Circuit's recognition that the District Court was not free to ignore the procedural mandates of Section 7 of the Norris-LaGuardia Act is well-supported. See, *e.g.*, *United States Steel Corp.* v. *United Mine Workers of America*, 456 F. 2d 483 (3rd Cir. 1972), *cert. denied* 408 U. S. 923 (1972); *Clune* v. *Publishers Association of New York*, 214 F. Supp. 520, 528 (S. D. N. Y. 1963), affirmed 314 F. 2d 343 (2nd Cir. 1963), *Local 205* v. *General Electric Company*, 233 F. 2d 85 (1st Cir. 1956), *affirmed* 353 U. S. 547 (1956). Certainly no hardship is entailed by requiring a district court to follow the mandates of Section 7 since these mandates are required under traditional equity principles. *Boys Market* v. *Retail Clerks Union, Local 770*, 398 U. S. 235, 254 (1970). As shown

4. See, *e.g.*, *American Can Co.* v. *Local Union 7420, U. S. W. A.*, ... F. Supp. ....., 81 L. R. R. M. 2706, 2708 (E. D. Pa. 1972) (federal judges "should be wary [that] in preserving the status quo [they] do not act to undermine the favored policy of arbitration.")

above, the finding of irreparable harm has always been a prerequisite to issuing injunctive relief to maintain the status quo on an equitable basis.

CONCLUSION.

For the above reasons, the writ of certiorari should not be granted.

Respectfully submitted,

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